

Efe (Migration) [2017] AATA 1309 (26 July 2017)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Ms Lady Len Languido Efe

CASE NUMBER: 1616659

DIBP REFERENCE(S): BCC2014/3428680

MEMBER: Moira Brophy

DATE: 26 July 2017

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:

- cl.820.211 of Schedule 2 to the Regulations; and
- cl.820.221(1) of Schedule 2 to the Regulations.

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on 26 July 2017 at 4:33pm

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CATCHWORDS

Migration – Partner (Temporary) (Class UK) visa – Subclass 820 – Insufficient evidence of relationship – Validly married – Mutual commitment – Relationship is genuine and continuing

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LEGISLATION

Migration Act 1958, ss 5F, 65,
Migration Regulations 1994, Schedule 2, cl

820.211, cl 820.221(1)

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Statement made

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision of a delegate of the Minister for Immigration on 20 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
2. The applicant applied for the visa on 14 December 2014 on the basis of her relationship with her sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant.
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.820.211 because the delegate was not satisfied that the sponsor and the applicant were in a genuine and continuing relationship.
4. The applicant, Ms Lady Len Languido Efe appeared before the Tribunal on 10 July 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor Mr Peter Robert Harry Franks.
5. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

Background

6. The visa applicant is a 33 year old female currently residing in Mount Isa Australia. She was previously in a relationship in the period from 17 September 2003 to 15 February 2012. There were two children of the relationship, a boy born in 2003 and a girl born in 2008. Her parents, and three sisters reside in the Philippines, one brother is currently residing in Bahrain.
7. The sponsor Mr Peter Robert Harry Franks is a 35 year old male living in Mount Isa. He has declared no previous relationships. Mr Frank's parents and one sister reside in Australia.
8. At the time of application the parties stated they had met in person in Bahrain on 10 August 2013 but they had been chatting online for six months prior to that having been introduced by the brother in law of the visa applicant. They were married by a civil celebrant on 4 March 2014 in Mount Isa. They had a wedding in the Philippines on 26 April 2014. Their first child, a daughter was born on 15 January 2015. Their second daughter was born on 6 July 2016. Their application for a Partner visa was lodged on 14 December 2014.

Tribunal Proceedings

9. The issue in the present case is whether the visa applicant and the sponsor were in a genuine and continuing relationship at the time of application and continue to be in a genuine and continuing relationship at the time of this decision.

10. In making its findings, the Tribunal has considered documents contained in the Department and Tribunal files and oral evidence provided by the visa applicant and sponsor at the hearing.
11. At the conclusion of the hearing the Tribunal requested further documentation and that was provided to the Tribunal on 24 July 2017. That documentation consisted of:
 - Statutory declaration from Megan Beth Jeffery attesting to the nature of the relationship between the applicant and the sponsor. She expressed her belief the relationship was genuine and continuing.
 - Statutory declaration from Bobby John Wehrman stating that it was his belief the marriage between the applicant and her sponsor was genuine and continuing.
 - Statutory declaration of Rishelle Sumalinog Mouldsdale stating she had known the applicant and sponsor for a period of some two and a half years and from her observation their relationship was genuine and continuing.
 - Copy of Certificate of marriage for the applicant and the sponsor.
12. The parties gave consistent and coherent oral evidence about the circumstances in which they met the development of their relationship and their current living arrangements. The Tribunal found them to be credible and was satisfied it could rely on their evidence in making findings of fact.
13. The Tribunal accepts the parties' oral evidence that they met online having been introduced by the applicant's brother in law. The applicant was working in Bahrain at the time and the sponsor travelled there to meet her in person on 10 August 2013. On 27 December 2013 the applicant arrived in Australia on a visitor visa. The Tribunal accepts they have lived together since that time. The parties were married in a civil ceremony on 4 March 2014. They travelled to the Philippines and their marriage was convalidated there in a traditional church wedding on 26 April 2014. Their first child, a daughter was born on 15 January 2015. Their second daughter was born on 6 July 2016.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

14. Clauses 820.211 and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian permanent resident.
15. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

16. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. There is nothing in the information before the Tribunal to cast doubt on the validity of the parties' marriage on 4 March 2014 and it was not disputed by the delegate. Consequently, in the absence of any evidence to the contrary, the Tribunal finds the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

17. Financial

18. The parties live in a home the sponsor recently purchased. Prior to that they lived in rented accommodation. The home is a three bedroom property and there is a mortgage on the property. The repayments are \$340 per week. The property and the utilities are in the name of the sponsor alone. The visa applicant is currently not in paid employment. The sponsor is employed on a full time basis in a scaffolding business. He earns around \$1200 net per week which is paid into an account in his name.
19. The parties gave consistent evidence that the sponsor manages their financial affairs and that he pays the mortgage and utilities from his account. The parties do not have credit cards. The applicant is able to access the monies held in the sponsor's name to meet her needs and the needs of their two young daughters. The sponsor transfers money to the Philippines on a regular basis to assist with the education and other needs of the applicant's two children there.
20. The Tribunal accepts from the oral evidence given at hearing that the parties pool their financial resources and share household expenditure. The Tribunal finds the financial aspects of the parties' relationship are consistent with their being in a genuine spousal relationship.

21. Nature of the household

22. The Tribunal accepts the parties have lived together since the applicant came to Australia in December 2013. The parties provided consistent and convincing evidence regarding the arrangements for their household. The applicant is responsible for the majority of the household chores but the sponsor assists when he is able and he washes his own work clothes. The sponsor does most of the cooking but both parties do the grocery shopping together.
23. The applicant cares for their two young daughters and she minds the daughter of the sponsor's sister a few days each week.
24. The evidence of the establishment of a joint household provides significant weight in support of the finding of a genuine and continuing relationship.

25. Social aspects of the relationship.

26. As noted above the Tribunal found the oral evidence provided by the parties to be clear and persuasive evidence that the parties have been in a loving couple relationship for three and a half years and that they provide one another with considerable support.
27. The applicant told the Tribunal she is actively involved in the Church and she attends Mass each Sunday along with their daughters. They gave evidence of seeing the

sponsor's sister frequently and of sharing celebrations such as birthdays with her and her family. The sponsor's parents reside in Brisbane but come to visit twice a year. The parties told the Tribunal the baptism of their youngest daughter was being held when his parents next visited later this month. The applicant was not able to drive so she mainly asked people to come to their house for meals and to play with the children. The sponsor gave evidence he generally worked six days a week. When this was considered along with the demands of being new parents they realistically have not had a lot of time to socialise.

28. Their oral evidence was supported by the statutory declarations provided to the Tribunal after the hearing.

29. On the basis of the oral evidence of the parties the Tribunal finds that the relationship between the applicant and her sponsor is recognised and supported by their family and friends. The Tribunal is satisfied that the parties represent themselves as being married to one another to their family, friends and the wider community.

30. *Nature of the person's commitment to each other.*

31. The Tribunal finds that the visa applicant and his sponsor have been in a committed relationship since they began they met in 2013. They have lived together continuously since December 2013. They both acknowledged the relationship had progressed rapidly after they met but both spoke of their loneliness prior to meeting and of their instant attraction.

32. The decision to have a family together indicates a significant commitment to the relationship by both the applicant and her sponsor. The applicant gave evidence at the hearing of their excitement when their daughters were born. It was readily apparent that their daughters are a significant part of their family and both parties were committed to ensuring the older children of the applicant were an integral part of their family plans.

33. The Tribunal has had the advantage of being able to observe the parties together at the hearing. Their emotional support for each other and companionship was readily apparent. They presented as a couple who loved and respected each other and who were devoted to their daughters.

34. The parties demonstrated a detailed knowledge of each other's lives and daily routines. Their evidence about their future plans was consistent. The Tribunal was satisfied that the applicant and her partner were committed to being in a long-term relationship. The degree of companionship and emotional support the parties clearly draw from one another provides significant weight in support of the finding that the parties are in a genuine and continuous relationship.

35. **CONCLUSION**

36. The Tribunal has had the benefit of receiving oral evidence in person from the parties as well as seeing the parties interact with each other. It has also received a considerable amount of additional information that was not before the delegate. The Tribunal accepts the parties were inexperienced and busy with their young family and that combination led to their not understanding the type of documentation required by the original decision maker.

37. Given these findings the Tribunal is satisfied that at the time of application and at the time of this decision the parties are validly married, have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship is

genuine and continuing. The Tribunal is satisfied the parties live together and therefore do not live separately and apart on a permanent basis.

38. Accordingly the Tribunal finds that the applicant satisfies the definition of spouse in s. 5F(2)(a)-(d) and the parties are in a spousal relationship.
39. The Tribunal is satisfied that the parties were in a genuine spousal relationship at the time of application and continue to be in a genuine and continuing relationship at the time of decision.
40. Ms Efe is not the holder of a Subclass 771 (Transit) visa. The Tribunal finds that Ms Efe is the spouse of Mr Franks, who is an Australian citizen, and is not prohibited from being a sponsoring partner. Accordingly the Tribunal finds that the requirements of cl.820.211(2)(a)(i) and (ii) are met.
41. The Tribunal is satisfied that at the time of application Ms Efe was sponsored by Mr Franks, who had turned 18, in accordance with cl.820.211(2)(c)(i), and that Ms Efe held a substantive visa at the time of application, so cl.820.211(2)(d) is not applicable.
42. As the requirements of cl.820.211(2) are met, the Tribunal finds that cl.820.211 is satisfied.
43. The Tribunal further finds that at the time of the Tribunal's decision Ms Efe continues to be Mr Franks' spouse, and continues to meet the requirements in cl.820.211(2), thus satisfying cl.820.221(1).
44. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

45. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - cl.820.211 of Schedule 2 to the Regulations; and
 - cl.820.221(1) of Schedule 2 to the Regulations.

Moirá Brophy
Member

ATTACHMENT - EXTRACT FROM MIGRATION REGULATIONS 1994

1.15A SPOUSE

(1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).